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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

Denise Dehning,

Petitioner,

v.

Child Development Services
of Fremont County, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The facts of this extraordinary case have become increasingly complex as it has passed through various forums, because the facts have been consistently, astonishingly unread or flagrantly ignored by the agencies and courts so far involved. Dehning presented the initial facts in long, narrow-margined, single-spaced documents that were clearly unread by the Wyoming Fair Employment Protection Agency (WFEPA) or the Equal Employment Opportunity Commission (EEOC), strengthening and encouraging the forging of new links in the chain of illegal and unethical acts that had caused her to seek protection in the first place.

Dehning, an otherwise ordinary citizen, is remarkable in some ways. She is doggedly willing to persist to her last breath to obtain justice; she is a self-starting, independent researcher who has continuously apprised herself of the laws pertaining to her case; and she is a thorough, scrupulous documenter. Her four-year log of this case memorializes every phone call, conversation, postal receipt, letter, and pleading. Her faith in the United States judiciary shattered by her experience, she turns to this august body in the interests of completing the record and exhausting her judicial remedies, before turning to other forums. Her story is amazing, calling to mind such popular movies as *Erin Brockovich* and *North Country*, and though she has not yet contacted the media or the film industry, public interest is certain to be aroused by her treatment and her perseverance.

QUESTIONS PRESENTED

1. Whether the Tenth Circuit violated plaintiff's constitutional right to due process;

2. Whether the Tenth Circuit erred in affirming a decision of a District Court clearly conflicting with contract law established in all jurisdictions.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Tenth Circuit included:

Denise Dehning,
Petitioner,

and

Child Development Services of Fremont County;
Scott Carlson;
Al McClelland;
Sandra Mossbrook;
Craig Tolman;
Laura Caniglio;
Karl Florence;
Jerry Nelson;
Pat Powell;
Cheri Copeland,
Respondents.

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OPINIONS BELOW

This case originated in the United States District Court for the District of Wyoming, case number 05-CV-249-CAB. Petitioner was never provided a filed copy of the order. The District Court filed no findings of fact or conclusions of law. The United States Court of Appeals for the Tenth Circuit issued its unsigned, unpublished opinion and order in this case on January 11, 2008. Petitioner, proceeding pro se, was not served notice that the case had been decided nor sent a copy of the opinion. Petitioner had to access the opinion from the Tenth Circuit's website. A copy of that opinion is attached hereto as Appendix A. On February 8, 2008 the Tenth Circuit issued its order denying the Petition for Panel Rehearing. A copy of that order is attached hereto as Appendix B.

JURISDICTION

This matter comes to the Honorable United States Supreme Court for review pursuant to 28 U.S.C. § 1254(1) as on appeal directly from a ruling of the United States Court of Appeals for the Tenth Circuit that was decided on February 8, 2008. This petition is filed within 90 days of that date in accordance with USCS Supreme Court Rule 13.1. Notice was served pursuant to USCS Supreme Court Rule 29.

CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES OF THE COURT INVOLVED

A. Federal Constitutional Provision

The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall be ... deprived of life, liberty, or property, without due process of law."

B. Statutory Provisions

Title 28, Appendix of the United States Code - Federal Rules of Appellate Procedure provides, in relevant part:

> Rule 36. Entry of Judgment; Notice
> (b) Notice. On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion – or the judgment, if no opinion was written - and a notice of the date when the judgment was entered.
>
> Rule 41. Mandate
> (b) When Issued. The Court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

Rule 41. Mandate
(d) Staying the Mandate.
(2)(A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court.

Title 28, Appendix of the United States Code - Federal Rules of Civil Procedure provides, in relevant part:

Rule 52. Findings by the Court.
(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon.

Title 42, Section 2000e-5 [Title VII § 706(b)] of the United States Code provides, in relevant part:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, ... the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, ... within ten days, and shall make an investigation thereof.

Wyoming Statutes Annotated § 1-23-105(a)(i), Statute of Frauds, provides:

In the following cases every agreement shall be void unless such agreement, or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith:

> Every agreement that by its terms is not to be performed within one (1) year from the making thereof;

C. Rules of the Court

Local Rule 40.1(A) of the United States Court of Appeals for the Tenth Circuit provides:

> A petition for rehearing should not be file routinely. Rehearing will be granted only if a significant issue has been overlooked or misconstrued by the court.

STATEMENT OF THE CASE

In June of 2004, Dehning, a physical therapist for babies and toddlers employed by Child Development Services of Fremont County (CDS) turned to the Wyoming Fair Employment Protection Agency (WFEPA) because of adverse employment actions following her report of sexual harassment by her supervisor. To the WFEPA Intake Questionnaire, Dehning attached a 10-page Supplemental Information document, which notes in its first sentence that she had two charges, and devotes nine pages to the retaliatory acts that eventually culminated in her constructive discharge and one page to harassment.

Though Dehning's in-house harassment grievance had not (to this day) been determined by CDS, the WFEPA managed to overlook the fact that it had no jurisdiction over the harassment issue and mysteriously and incompetently issued

only a harassment charge, ignoring retaliation, the thrust of Dehning's complaint and the reason she filed it.

When Dehning called the WFEPA to protest, she was told that the charge had been sent to the EEOC and was assured that the EEOC would "investigate thoroughly" and "look at everything."

The EEOC, however, did neither, violating federal law and its own policy while it had the case. The EEOC did not serve the charge on defendants within the ten days required by 42 U.S.C. § 2000e-5 [Title VII §706(b)], but only after more than a month and three phone messages from Dehning reporting that she had now lost her job. Further, the EEOC ignored Dehning's calls for two weeks, in violation of its written policy requiring it to respond to complainant phone calls within two business days.

In the meantime, relying on the EEOC's obligation to serve her charge within ten days and unaware that it had not, Dehning waited ten days to reapply for her job, expecting that CDS' actions would be influenced by its knowledge that a watchdog agency was involved. CDS, unaware that the EEOC was involved, did not rehire Dehning, instead hiring multiple personnel to cover her caseload.

The EEOC investigator, hopefully atypical of EEOC investigators, far from curing the WFEPA error, also missed the fact that the EEOC had no jurisdiction over the question of harassment and treated the case exclusively as a harassment case. The investigator contacted Dehning only once, focused solely on harassment, rudely interrupted

Dehning and would not let her speak when Dehning tried to raise retaliation – the reason she had filed the charge – and clearly demonstrated, as per Dehning's notes on the conversation, an ignorance that retaliation was at issue.

Following CDS' refusal to rehire her, Dehning turned to the WFEPA again, complaining of retaliatory failure to rehire. Again, her complaint was referred to the EEOC, which had yet taken no action on the first charge. When Dehning's phone calls were not returned, she contacted Wyoming's US Congresswoman, Barbara Cubin, who wrote to the EEOC on Dehning's behalf, and then, over the course of several weeks, wrote again, and again. The day the EEOC received Cubin's third letter, the EEOC investigator herself retaliated, calling Dehning to report that she, having never investigated Dehning's complaint of retaliation, was recommending dismissal, based, again as per Dehning's notes, on the fact that "the harassment stopped" – as if this were the standard for a finding of harassment, even had the EEOC had jurisdiction.

The EEOC supervisor reviewing the recommendation of dismissal also interrupted Dehning and would not let her speak when she tried to raise the retaliation issue and also recommended dismissal "because the harassment stopped." Dehning appealed the dismissal. The EEOC affirmed the dismissal.

Dehning contacted 18 attorneys, none of whom was willing to take what erroneously appeared to be a harassment case already dismissed by the EEOC. Her window to litigate the charge closed.

Dehning was aware, however, that EEOC cases can be reopened. She accepted that she could not litigate the facts of the retaliation leading to her constructive job discharge, but intended – and intends – to force a reopening of the case. (Despite letters from Wyoming's U.S. Senators Enzi and Craig, Cubin, and Vice President Cheney, the EEOC has refused to respond to the questions of why the EEOC refused to address Dehning's complaint of retaliation in her first charge and why a 17-page document Dehning filed appears to be missing from the EEOC file.)

The EEOC issued a Right to Sue letter on Dehning's second charge, retaliatory refusal to rehire. Dehning retained Riverton attorney Donald Rissler, whose incompetent representation is reflected in the record. Mr. Rissler has since died, at age 49, shortly after his provable perjury in the federal district court.

On Mr. Rissler's advice, Dehning mediated. The mediation was not recorded in any way. CDS offered Dehning her job back. Because Dehning refused to be supervised by her former supervisor or the CDS director, the parties agreed that Dehning would return to work as an independent contractor. By CDS' own admission, the purpose of the independent employment contract was to obviate such supervision. At the end of the mediation, the mediator directed the parties to reduce the agreement to writing.

The settlement documents were unsatisfactory for various reasons. Rissler's Release (he had not advised Dehning that she would be releasing the prior claim she was independently pursuing)

included prospective claims and made no mention of the independent employment contract.

More importantly, the independent employment contract prepared by CDS did not conform to the settlement agreement in three critical aspects. The contract actually called for increased supervision by Dehning's former supervisor and the CDS director, gave CDS control over Dehning's hours, and severely limited her scope of practice, all in violation of the agreement. CDS had unilaterally modified the contract. The minds of the parties had clearly not met.

When Dehning refused to sign the settlement documents, Rissler falsely imprisoned her, initially saying, "You cannot leave this office until you have signed these documents!" He then agreed that the independent employment contract was nonconforming and said he would have CDS cure the contract.

Thereafter Rissler sent Dehning a new CDS-prepared contract. The contract cured none of the defects and in fact added a new sentence reinforcing one of the defects. The contract on its face does not conform to the mediator's Settlement Letter.

Rissler moved to withdraw, advising Dehning that a hearing would be necessary. CDS moved to enforce the settlement agreement. Dehning waited for the hearing on the motion to withdraw. Nine weeks later Judge Clarence Brimmer granted the motion to withdraw without hearing. Dehning immediately consulted Lander attorney Aparna Durbin, who sent CDS a settlement offer on Dehning's behalf. CDS rejected the offer.

Durbin was unable to further represent Dehning, who then retained Lander attorney Donna Courtney, unaware that Courtney was disabled by alcoholism. Courtney has since been placed on disability inactive status by the Wyoming Supreme Court.

Courtney, after missing pleadings deadlines, eventually hired a legal writer to brief the issues, prepare an affidavit, and move to dismiss, then made herself unavailable to Dehning or the writer. The day the pleadings were due, Courtney signed the pleadings without reading them, and Dehning drove the ten-hour round trip from Lander to Cheyenne and filed them.

Dehning arrived at the hearing on the Motion to Enforce Settlement expecting an arguments hearing. The record shows that CDS gave no notice that it was producing witnesses. (The Tenth Circuit later observed that Dehning's version of the facts at the hearing was supported by no witnesses on her behalf when in fact she had no opportunity to present witnesses.)

Courtney did not object that the hearing had turned suddenly without notice into an evidentiary hearing. Thus ambushed, Dehning was nevertheless able to introduce the contract variances into the record, which variances alone make the settlement agreement unenforceable.

The Good Old Boys network has made a strong showing in this case since Dehning's complaint to the CDS director of harassment. The hearing transcript shows that Judge Brimmer, stroke-impaired and hearing-impaired, came to the hearing unacquainted with the facts or the law,

unable to understand either, and strongly predisposed in favor of the white males opposing Dehning and her counsel. Dehning has since filed a complaint of Judicial Disability against Judge Brimmer, decided by the Tenth Circuit in favor of Judge Brimmer. Her appeal is pending.

At the conclusion of the tragicomic hearing he conducted, Judge Brimmer found for CDS – except for Dehning's employment, which he found she had waived – and imposed punitive costs against Dehning, stating that Dehning, whose pursuit of her case was on the advice of two lawyers, had "arbitrarily and willfully refused to carry out her grievance."

Following the hearing, Courtney manifested a series of bizarre behaviors, including instructing Dehning to write her own pleadings for Courtney's signature and failing to advise Dehning of subsequent events in her case or provide her with case documents. Dehning has proceeded in the case pro se (but not in forma pauperis) since January, 2007.

Dehning appealed to the Tenth Circuit, which decided her case on January 11, 2008. In violation of the United States Code, the Federal Rules of Appellate Procedure (FRAP), and the United States Constitution, the Tenth Circuit did not send notice or a copy of the opinion to Dehning, but only to opposing counsel. FRAP 36(b).

Dehning learned of the opinion by calling the Tenth Circuit to ask the status of her case. She therefore learned of the decision, through her own diligence, three days before the deadline for filing a petition for panel rehearing. Though she should

not have had to move for an extension of time to petition for a panel rehearing, she was forced to do so. The Court delayed its ruling on her request, ultimately granting her three business days to file the petition!

Dehning mailed her Petition for Panel Rehearing three business days later, having been advised by a member of the Tenth Circuit staff that the mailing date was the filing date. The morning of the day the petition reached the Court, the Court issued its Mandate. The next early morning, the petition was denied.

Dehning called the Tenth Circuit and after the usual runaround, spoke to the Clerk's counsel, who looked into the matter and called Dehning back to say the petition was filed late, that according to the rules, it was due on the date it was mailed. Presumably, the Tenth Circuit was allowed to break the rules, but Dehning wasn't.

Because the petition for rehearing had been denied within a few hours of its receipt, leading Dehning to believe that the Court did not read it; and because her information was that the petition was deemed late; and because the petition shows that the settlement agreement was unenforceable, Dehning filed a Motion to Consider Petition for Panel Rehearing.

The Tenth Circuit, construing this motion as a Motion to Recall Mandate, declared that Dehning's petition for rehearing had in fact been timely filed and had been carefully considered and denied on its merits. No mention of the Mandate appears in the Court's order.

Dehning was not allowed to move to stay the Mandate, solely due to the illegal acts of the Tenth Circuit, beginning with its failure to give her notice that it had decided her case, causing grievous harm in that Defendants have distributed the monies.

Dehning's rights had again been violated, this time by a body charged with protecting her rights. The case now seemed to be in a hopeless snarl. Believing that the tangle could only be corrected by starting over, Dehning filed a Motion to Enter Judgment in Accordance with FRAP and the United States Constitution, which motion the Court refused to entertain.

It is worth noting that Tenth Circuit Chief Deputy Clerk Douglas Cressler took an adversarial stance with Dehning from their first contact, saying, among other things, when Dehning protested that the Court couldn't possibly have carefully read and considered her petition for rehearing in the given time frame that it didn't matter if the Court looked at the petition for only one second. Cressler further refused to provide Dehning with a timeline of the events in her case, first stating falsely that he didn't know if a timeline existed.

The Mandate was issued on February 7, 2008. Six and a half weeks later, on March 25, Dehning received electronic notice that the Mandate was issued as of that date. The next day she received notice that the new Mandate was a clerical error. Eight minutes later, she received a third notice, indicating that the Mandate was in fact reissued on March 25.

REASONS FOR GRANTING THE WRIT

1. Plaintiff's constitutional rights to due process have been violated by a body designed to protect such rights.

The United States Constitution requires that all persons be afforded due process under the laws. The judicial arm of government was established to protect these rights. It is thus particularly heinous when a court violates these rights.

The Tenth Circuit failed to afford plaintiff due process, in violation of the United States Constitution and numerous provisions of the 28 U.S.C. Appendix (Federal Rules of Appellate Procedure).

The Tenth Circuit's first violation of the Constitution and the FRAP was in its failure to give Dehning notice that it had decided her case or to provide her a copy of the opinion. FRAP 36(b). Dehning had been proceeding pro se (though not in forma pauperis) for more than a year and had received other communications from the Tenth Circuit. Eleven days after the opinion was filed, Dehning happened to call the Tenth Circuit to inquire the status of her appeal, so learned of the decision through her own diligence.

In keeping with her experience throughout her case, Dehning was falsely advised by two Tenth Circuit staff members that notice and a copy of the opinion had been mailed to her. The Notice of

Docket Activity, however, reflects that notice was given only to defendants.

Dehning was thus forced to request an extension of time for a petition for panel rehearing, which she should certainly not have had to do. The Tenth Circuit delayed its ruling on her request, finally granting her three business days to file such petition. A Tenth Circuit staff member incorrectly advised her that the postmark date was the filing date. Dehning mailed her Petition for Panel Rehearing on the third business day following the granting of her motion, clear evidence that had she been given the legally required notice, her Petition for Panel Rehearing would have been filed within the 14 days mandated by FRAP 40(a)(1).

The morning of the day Dehning's Petition for Panel Rehearing reached the Court, February 7, 2008, the Court issued its mandate.

The next morning, February 8, at 8:08 a.m., her petition was denied.

Dehning's subsequent calls to the Tenth Circuit yielded the information that her petition for rehearing had not been timely filed. Fully aware that the District Court had radically departed from established principles of contract law by enforcing the settlement agreement at issue and that the Tenth Circuit had overlooked or misconstrued numerous significant issues in affirming the District Court – all illuminated in her petition for rehearing – Dehning moved the Court to consider her petition for rehearing.

The Tenth Circuit, construing Dehning's motion as a Motion to Recall Mandate, responded by asserting that it had considered her petition for

rehearing as timely and had considered it carefully, thus asking Dehning to believe that all the judges of the panel had carefully reviewed her 20-page petition in the space of a few hours at most and denied it on its merits, despite its several incontrovertible arguments concerning the District Court's failure to apply proper law and the Tenth Circuit's overlookings and misconstructions of significant issues in the case.

Having renamed Dehning's motion to consider her petition for rehearing, denominating it a Motion to Recall Mandate, the Tenth Circuit denied the motion, but without mentioning the mandate, leaving Dehning unclear about the Court's exact ruling.

Presumably, the Court was refusing to recall the mandate. But the Tenth Circuit had given her no opportunity to stay the mandate, in violation of FRAP 41(b), and causing Dehning grievous harm in that Defendants have since distributed the monies.

For four years Dehning had been battling illegal, unethical, unjust and/or incompetent acts, from defendant CDS to the WFEPA to the EEOC to the two lawyers she retained to the federal district court, and now the federal appellate court. Her appeal seemed in a hopeless snarl, entirely due to the Tenth Circuit's initial misfeasance, which it continued to compound.

Hoping to secure the legal rights afforded to every appellant, Dehning filed a Motion to Enter Judgment in Accordance with the United States Constitution and the Federal Rules of Appellate Procedure. In reply, she received a letter from Chief Deputy Clerk Douglas Cressler, advising that

the Court would not entertain the motion. Cressler has been antagonistic to Dehning since their first encounter. Their conversations have included such remarks by him as, "It doesn't matter if the judges only looked at your petition for rehearing for only one second," and "Back where I come from, there is a saying that a pancake is so flat it always has two sides."

On March 25, six weeks after the Court had issued its mandate, Dehning received electronic notice that the mandate was issued as of March 25. The next day she received notice that the mandate had been issued on February 7, and the March 25 mandate was an error. Eight minutes later, she received notice that the mandate had in fact been issued on March 25.

2. The decision below radically departs from well-established principles of contract law.

Certain principles of contract law are established in all jurisdictions. The minds of the parties must meet. Brockman v. Sweetwater County School District, 25 F.3d 1055 (10th Cir. 1994); Wyoming Sawmills v. Morris, 756 P.2d 774 (Wyo. 1988) An oral contract intended to be reduced to writing is incomplete until the contract is written and signed. Wyoming Sawmills v. Morris, supra. A unilateral mistake is not grounds for avoidance of a contract unless the mistake was produced by the conduct of the other party. Givens v. Fowler, 984 P.2d 1092, 1096 (Wyo. 1999). A contract may not be unilaterally modified in the

absence of additional consideration. Harvard v. Anderson, 524 P.2d 880, 883 (Wyo. 1974); Wilder v. Cody Country Chamber of Commerce, 868 P.2d 211 (Wyo. 1994); Brodie v. General Chemical Corp., 934 P.2d 1263 (Wyo. 1997); Brodie v. General Chemical Corp., 112 F.3d 440 (10th Cir. 1997); McIlravey v. Kerr-McGee Corp., 119 F.3d 876 (10th Cir. 1997).

The record herein fairly shouts that the minds of the parties did not meet, that the oral agreement was intended to be reduced to writing, that CDS, not Dehning, was mistaken in its interpretation of the agreement, i.e., the terms of the independent employment contract, and that CDS in fact unilaterally modified the employment contract without notice or additional consideration.

The Tenth Circuit overlooked or misconstrued a shocking number of points of law and fact, proving its unfamiliarity with the facts and law of the case. Dehning now addresses these errors in the order of their appearance in the opinion.

The Tenth Circuit characterized Dehning's first charge as a sexual harassment charge. Thousands of words have been spent on this case debating whether sexual harassment was an issue at litigation, a question that only arose because of the misfeasance of the WFEPA and the EEOC in interpreting Dehning's first complaint as a sexual harassment complaint, when the 10-page Supplemental Information document she filed with her completed WFEPA Intake Questionnaire shows beyond question that her complaint was inspired by adverse employment actions following her report of harassment. Plaintiff's efforts to clarify this point

were interrupted, cut short, and unheard by both EEOC personnel who handled the case.

[Note: Dehning's theory about why the EEOC decided as it did and has subsequently ignored the questions of all Wyoming's United States congresspeople and Vice President Cheney's office, is that it intended to issue a Right to Sue letter on the subsequent retaliatory failure to rehire, which it did, and refused to address the retaliation of the first charge to cover up its failure to serve notice of the first charge within the 10 days required by 42 U.S.C. § 20000e-5 [Title VII § 706(b)]. This failure had grave consequences, as CDS would surely have rehired Dehning had it known she had complained to a protective agency. By pretending that retaliation did not occur until the time of the second charge, the EEOC appears to be hoping to sweep the initial retaliation under the rug.]

In any event, sexual harassment was not an issue in this case. Apart from the facts that CDS to this day retains jurisdiction over the question of harassment, having never decided Dehning's in-house harassment grievance, and that the Complaint alleges retaliation and not harassment, the issue in this case is the nonconforming independent employment contract.

Again, the Tenth Circuit's opinion states that Dehning "refused to sign the employment agreement because she did not like the language, although she refused to suggest any changes." The record clearly contradicts this. The record contains a letter from Rissler, Dehning's first counsel, indicating that he was enclosing a new copy of the contract, revised in accordance with her demands.

(The revised contract, in the record, shows on its face that the defects were not cured, but that one defect was in fact reinforced by additional redundant language.) The record also contains a letter on Dehning's behalf from Lander attorney Aparna Durbin, suggesting changes to the contract to bring it into line with the agreement, which suggestions were refused by CDS.

The Tenth Circuit states: "At the enforcement hearing, the mediator testified that the confidential mediation statement received from Ms. Dehning's original lawyer described her claim as including both sexual harassment and unlawful retaliation and 'we discussed the issues during the entire day.'" Again, apart from the facts that (1) Dehning was not allowed to meet with Rissler to discuss the mediation statement, (2) Dehning assumed the discussion of harassment in the statement was to show that her retaliation claim was based on harassment rather than some other reason, (3) the Complaint did not allege harassment, and (4) Dehning was precluded from litigating harassment because her litigation window had closed, sexual harassment was simply not, and could not have been at issue. Jurisdiction over the question of harassment lay elsewhere, with CDS, which never determined her harassment grievance.

The Tenth Circuit devoted paragraphs to Dehning's claim that she was not advised, either by her counsel, or by the mediator, that in settling, she would be releasing the prior claim that she was independently pursuing, and cited Givens v. Fowler, 984 P.2d 1092, 1096 (Wyo. 1999) as support

for its conclusion that this mistake was unilateral and not caused by CDS' conduct.

What's wrong is wrong. Before mediating, Dehning required a letter from Rissler, detailing exactly what she would be committing to by mediating. Rissler, perjuring himself, testified that this letter advised Dehning she would be releasing all claims. The letter, in the record, makes no mention of a release. Mediator Vlastos testified that in directing Rissler to prepare a release, he was referring to the usual and standard release of all claims. He did not, however, otherwise describe or explain the release, which Dehning reasonably assumed would be a release of the underlying litigation. In any event, the release (which included prospective claims and made no mention of the employment contract) is moot. The settlement agreement was unenforceable because the independent employment contract, an essential term of the settlement, did not conform to the agreement, in either its original or revised forms.

The Tenth Circuit stated that Dehning refused to sign the independent employment contract because she disagreed with "some of the language." The language Dehning disagreed with changed the terms of the settlement agreement substantively. Dehning's efforts, through two attorneys, to force a conforming contract, were unsuccessful.

The Tenth Circuit stated that CDS' (former) director "testified he understood Ms. Dehning was settling all of her claims, including harassment and had to hire a replacement when Ms. Dehning refused to sign the employment agreement." First, the former CDS director's understanding of the

settlement is irrelevant. Second, his need to hire a replacement was CDS' fault, not Dehning's. Dehning wanted to go back to work and tried through two attorneys to force CDS to write an employment contract that would conform to the agreement. The CDS letter to Aparna Durbin, in the record, shows that the minds of the parties had not met and that CDS had committed a unilateral mistake, not caused by Dehning's conduct.

The Tenth Circuit stated that the district court "has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." This is true, but only if the settlement agreement is enforceable. The settlement agreement here was unenforceable.

The Tenth Circuit stated the standard for review as abuse of discretion and stated: "An abuse of discretion occurs when the Court's decision is based on an erroneous conclusion of law or a clearly erroneous factual finding." Judge Brimmer filed no Findings or Conclusions. The basis for his decision must be found in the transcript, which is gorged with evidence of partiality and mental incompetence, and includes a number of instances where he simply refused to hear plaintiff's evidence and argument on matters central to the controversy.

Judge Brimmer cited Brockman v Sweetwater, supra, as legal support for his decision to enforce the agreement:

> Under the authority of Brockman versus Sweetwater County School District, which was a published case in 826 Fed supp q328, it is held

> that where such an agreement compromise – an agreement of compromise and settlement is reached, it is a valid agreement, that saves the parties time and money, and it also saves the little resources of the Court. And for that reason it should be enforced.

Judge Brimmer had clearly not so much as leafed through the extensive record, had not read the arguments, and was unacquainted with the facts of the case, as much so at the end of the hearing as at the beginning. Brockman, decided on the sole ground that the verbatim transcript of the mediation constituted a writing, was favorable to plaintiff, whose mediation was not recorded. Judge Brimmer's one and only conclusion of law was erroneous and requires reversal.

Factually, Judge Brimmer found that Dehning "had no reasonable ground for refusing to sign the settlement papers." Although Judge Brimmer had repeatedly bullied, rushed, and interrupted both Dehning and her female counsel, Dehning had managed to introduce evidence of substantial variances between the settlement agreement and the two independent employment contracts CDS had offered. During the three minutes of closing argument Judge Brimmer allowed (he had a party to go to), Courtney referred to this evidence. Judge Brimmer said: "I don't – I don't know. ... I don't know what hearing you were [sic], but I haven't heard that." Judge Brimmer was unacquainted with the record, had refused to hear relevant evidence, had demonstrated a shocking failure to understand the case, and had entirely forgotten

evidence favorable to Dehning. The finding that Dehning had no reasonable ground for refusing to sign an employment contract that did not conform to the settlement agreement or a release that included future claims is clearly erroneous.

The Tenth Circuit, citing Givens v Fowler, supra, stated: [A] unilateral mistake is not grounds 'for avoidance of the contract ... unless the mistake was produced by the conduct of the other party.'" The Tenth Circuit was referring here to the misunderstanding about the release of Dehning's prior claim, but in fact Givens is applicable here. A unilateral mistake was made – by CDS, not Dehning. CDS' letter to attorney Durbin rejecting Dehning's settlement offer, in the record, shows clearly that CDS misunderstood the agreement, through no conduct of Dehning's.

While conceding that the purpose of the independent contract was to bypass supervision by the two men Dehning refused to be supervised by, this letter goes on to explain that Dehning would in fact be subject to greater supervision by these two men than she was as an employee. CDS had undertaken to unilaterally modify the agreement without additional consideration. Givens v. Fowler, 984 P.2d 1092, 1096 (Wyo. 1999).

The parties had always intended that the unrecorded mediation would not be final until reduced to writing – to obviate just the sort of misunderstanding that occurred. Rissler, Dehning's representative at mediation, himself testified: "[T]he agreements, meaning the contract and the settlement agreement were not completed. They were there for her review and changes could

have been made to those agreements." His further testimony that Dehning simply refused to tell him why she wouldn't sign the documents is contravened by his own letter, in the record, stating "Enclosed herein please find the revised contract with the changes you wanted" – accompanying a revised contract that did not cure the contract's defects – and also by his testimony that Dehning had objected to the release of future claims. The letter does not offer to revise the release or ask if the contract was now acceptable, but directs Dehning to come in and sign.

The Tenth Circuit stated that Dehning's testimony "was contradicted by every other witness." The record shows that Dehning was not given notice that witnesses would attend the hearing. She had expected arguments on the law, which she knew was favorable to her. She was ambushed and given no opportunity to produce witnesses of her own. Further, the record shows that much of the testimony and argument adduced against her was in conflict with the record, of which the trial judge was entirely ignorant.

The Tenth Circuit stated that courts have "inherent authority to 'assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" The record belies this. Dehning was pursuing justice, not only because she knew she was in the right, but on the advice of two attorneys.

The Tenth Circuit affirmed the district court's punitive award of attorney fees (on the basis of defense counsel's mistaken assertion that Title VII authorized his attorney fees), witness travel costs,

and $1209 for the mediator – despite the mediator's twice-repeated testimony that he was not charging for the day – stating: "Because the record supports the district court's factual finding that Ms. Dehning's litigation conduct in refusing to consummate the settlement agreement was 'arbitrary, willful, and without cause', we affirm the award of fees and costs." The district court did not file Findings of Fact and Conclusions of Law as required, but found as a fact at the hearing that Dehning had "arbitrarily and willfully refused to carry out her grievance," one of a multitude of examples of its judicial disability.

The Tenth Circuit declined to address the Statute of Frauds because the district court did not enforce the settlement agreement. The settlement agreement was unenforceable, and the Statute of Frauds does apply. An essential term of the agreement, the independent employment contract, was not performable within a year. The mediation took place in April. Dehning's one-year employment contract was to commence the following August. Wyo. Stat. Ann. § 1-23-105(a)(i).

Even if a trial court's finding is supported by substantial evidence – which in this case it was not – its presumption of correctness will be set aside if against the great weight of evidence. Shores v. Lindsey, 591 P.2d 895 (Wyo. 1979); Hopper v. All Pet Animal Clinic, 861 P.2d 531 (Wyo. 1993). See also U.S. v. Gypsum, 33 U.S. 364 (1948). The evidence the district court relied on was confined to the testimony and argument, much of which was provably incorrect and/or perjured. The district judge's finding was against the great weight of

evidence already in the record at the time of the hearing, as he would have known had he bothered to acquaint himself with the record.

Dehning's pursuit of justice was far from arbitrary, willful, and without cause. The record reflects that Dehning was advised by counsel that the settlement agreement was unenforceable. The record reflects that the release prepared by her then counsel included prospective claims and does not even mention the independent employment contract, an essential term of the agreement. The record reflects that the parties contemplated a writing to complete the agreement. The record reflects that the minds of the parties did not meet – CDS' understanding of the independent employment contract, as per its letter to Durbin, was clearly different from the terms set forth in Mediator Vlastos' settlement letter. The record reflects that CDS tricked Dehning into agreeing to an independent contract with the understanding that she would not be supervised by her former supervisor or the CDS director, when in fact as an independent contractor, she was subject to greater supervision by both. The record reflects that CDS unilaterally modified the employment contract without notice or additional consideration.

CONCLUSION

The following words appear on the United States Supreme Court website:

> "EQUAL JUSTICE UNDER LAW" – These words, written above the main entrance of the

> Supreme Court building, express the ultimate responsibility of the Supreme Court of the United States. The court is the highest tribunal in the Nation for all cases and controversies arising under the Constitution or the laws of the United States. As the final arbiter of the law, the court is charged with ensuring the American people the promise of equal justice under law, and thereby, also functions as guardian and interpreter of the constitution.

These are heartening, inspiring words. Dehning's quest for equal justice has so far been in vain. Dehning prays that this Court, the final arbiter of the law, charged with ensuring equal justice to all, review the entirety of her complex case, or in the alternative, to summarily reverse.

FILED
United States Court of Appeals - Tenth Circuit
January 11, 2008
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENISE J. DEHNING,

Plaintiff-Appellant,

v.

No. 07-8008
(D.C. No. 05CV249B)
(D. Wyo.)

CHILD DEVELOPMENT SERVICES OF FREMONT COUNTY; et. al,

Defendants-Appellees.

ORDER AND JUDGMENT*

Before TACHA, McCONNELL, and GORSUCH, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Plaintiff Denise J. Dehning appeals from the district court's order enforcing a settlement agreement and awarding attorney fees and costs incurred in the enforcement action. We affirm.

This suit arises from Ms. Dehning's tenure as a physical therapist for Child Development Services ("CDS"), a non-profit that serves developmentally disabled children in Fremont County, Wyoming. While working at CDS, Ms. Dehning alleged that she was sexually harassed by a fellow employee. When her written grievance about that conduct was not resolved to her satisfaction, she filed a complaint with the Wyoming Fair Employment Protection Agency ("WFEPA"), which in turn referred the matter to the Equal Employment Opportunity Commission ("EEOC"). While her sexual harassment charge was under investigation, she filed a second complaint with the WFEPA in which she alleged retaliation because CDS failed to renew her contract after she complained of harassment. Ms. Dehning's retaliation complaint was likewise referred to the EEOC.

On May 31, 2005, the EEOC dismissed Ms. Dehning's sexual harassment charge and notified her that "to pursue this matter further, [she] must file a lawsuit . . . within 90 days . . . ." Aplt. App., Vol. II, Ex. 44 at 2. As to her retaliation charge, the EEOC found reasonable cause to believe her claim, and on June 24, 2005, it issued a right to sue letter. On September 24, 2005, she sued CDS, its board and executive director, and a co-worker for both sexual harassment and unlawful retaliation under Title VII. *See* 42 U.S.C. § 2000e, *et seq.*

Eventually, the parties engaged in mediation and reached an agreement in which Ms. Dehning agreed to settle her claims against the defendants in exchange for $30,000 and CDS's agreement to hire her as an independent contractor for one year beginning August 2006. Later, however, Ms. Dehning refused to follow through with the settlement, claiming she never agreed to compromise her sexual harassment claim. She also refused to sign the employment agreement because she did not like the language, although she refused to suggest any changes.

The defendants moved the district court to enforce the settlement agreement. Because Ms. Dehning's lawyer withdrew from the representation, she retained new counsel to represent her at the hearing on this motion. At the enforcement hearing, the mediator testified that the confidential mediation statement received from Ms. Dehning's original lawyer described her claims as including both sexual harassment and unlawful retaliation and "we discussed the issues during the entire day." Aplt. App., Vol. IV at 21. He further testified he "gathered the parties after the agreement had been reached and went through each of the terms in the presence and with the parties there. And each consented and indicated that this is the agreement that we had." *Id.* at 26. The next day, the mediator reduced to writing the terms of the agreement. Among other things, he confirmed that in exchange for $30,000, Ms. Dehning's lawyer would prepare a "release [of] all claims, known or unknown," against the defendants, *id.*, Vol. III, Ex. 1 at 1, and the

defendants' lawyer would prepare a written agreement for CDS to hire her as an independent contractor. CDS also agreed to sexual harassment training and to review and update its policies.

Donald Rissler, Ms. Dehning's first lawyer, testified that the parties' settlement agreement included both her retaliation and sexual harassment claims – the agreement "encompassed all of it. It was a global settlement and I believe everyone understood that." *Id.*, Vol. IV at 61. During the mediation, Ms. Dehning showed him a book on sexual harassment and "recited to me and pointed out to me several sections in the book that had to do with sexual harassment law and the rule of damages. So she was fully aware of what was going on during our discussions." *Id.*

For her part, Ms. Dehning testified she tried to avoid the settlement agreement because "it was never explained to [her] what the release document [was] before the mediation conference or at the mediation conference." *Id.* at 52. She acknowledged the existence of an oral agreement to hire her as an independent contractor, but refused to sign the contract because of her disagreement with some of the language. The executive director of CDS testified he understood Ms. Dehning was settling all of her claims, including sexual harassment, and had to hire a replacement when Ms. Dehning refused to sign the employment agreement.

Following the enforcement hearing, the district court entered a written order on December 11, 2006, dismissing the case with prejudice and enforcing the settlement agreement, with the exception of the employment agreement because

Ms. Dehning's refusal to finalize the employment agreement "constituted a waiver of her right to such agreement." *Id.*, Vol. 1, Doc. 43 at 3. The court also found her "refusal to abide by the terms of the settlement agreement was arbitrary, willful, and without cause," *id.*, and ordered her to pay the defendants' attorney fees and the mediator's costs to attend the hearing.

On December 19, 2006, the district court granted Ms. Dehning's motion for a stay pending appeal. The same day, the court also granted the defendants' motion for Ms. Dehning to post a bond during the pendency of her appeal. The court later denied her motion to extend the deadline for filing an appeal, and on February 5, 2007, Ms. Dehning filed her notice of appeal *pro se*.

Before us, the defendants argue first that Ms. Dehning's appeal from the orders dated December 11 and 19, 2006, should be dismissed because her notice of appeal was untimely. We disagree. Admittedly, the notice was required to "be filed . . . within 30 days after the judgment or order appealed from is entered." Fed. R. App. P. 4(a)(1)(A). The district court, however, failed to prepare the separate document required by Rule 58(a) of the Federal Rules of Civil Procedure for entry of the orders; therefore, judgment did not enter for purposes of filing the notice until "150 days . . . from the entry [of the December 11 and 19 orders] in the civil docket." Fed. R. Civ. P. 58(c)(2)(B). Thus, the February 5, 2007 notice of appeal was timely.

In reviewing Ms. Dehning's appeal on the merits, we are mindful that she is proceeding *pro se*

and, accordingly, her papers are due a solicitous construction. *See Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007); *Andrews v. Heaton*, 483 F.3d 1070, 1076 (10th Cir. 2007). We are equally mindful, however, that under our precedents the district court "has the power to summarily enforce a settlement agreement entered into by the litigants while the litigation is pending before it." *Shoels v. Klebold*, 375 F.3d 1054, 1060 (10th Cir. 2004) (citation omitted). And we may review the decision to enforce such an agreement only "for an abuse of discretion." *Id.* An abuse of discretion occurs when the court's decision is based on an erroneous conclusion of law or a clearly erroneous factual finding. *Gen. Motors Corp. v. Urban Gorilla, LLC*, 500 F.3d 1222, 1226 (10th Cir. 2007).

The central question before us – whether a binding contract existed between the parties – is a question of fact, and thus subject to reversal only in the presence of a clear error by the district court. See *Parkhurst v. Boykin*, 94 P.3d 450, 459 (Wyo. 2004) ("[w]hether a contract exists, its terms and conditions and the intent of the parties generally are questions of fact to be resolved by the fact-finder"). The basic elements of a contract in Wyoming are the traditional ones: "offer, acceptance, and consideration. . . . When these elements have been established, courts conclude that there has been a meeting of the minds and an enforceable contract exists." *Frost Constr. Co. v. Lobo*, Inc., 951 P.2d 390, 394 (Wyo. 1998) (internal citation and quotation marks omitted). More to the point, a unilateral mistake is not grounds "for avoidance of the contract . . . unless the mistake

was produced by the conduct of the other party." *Givens v. Fowler*, 984 P.2d 1092, 1096 (Wyo. 1999).

Ms. Dehning admits that she agreed to the settlement agreement, but claims she misunderstood it. To her mind, it encompassed only her retaliation claim and did not include a compromise of her sexual harassment claim. There is, however, no evidence the defendants were responsible for her mistake concerning the scope of the claims included in the agreement. Further, the district court's findings that Ms. Dehning's position was unrealistic[,]" Aplt. App., Vol. IV at 97, and that the parties reached a contract is supported by the evidence. In addition to the fact Ms. Dehning's testimony was contradicted by every other witness, it was also belied by her mediation statement, which stated, "[t]his is a sexual harassment and retaliation case[,]" *Id.*, Vol. III, Ex. 9 at 1, and the parties' settlement agreement, which required CDS to provide training and update its policies on sexual harassment.

Ms. Dehning separately argues the employment agreement portion of the settlement violated the statute of frauds because it was not in writing. This argument is, however, irrelevant in light of the district court's conclusion that "the independent contractor agreement has been waived[.]" *Id.*, Vol. IV at 98. Because the district court did not enforce the employment agreement, we do not address whether the statute of frauds applies. See *Orr v. City of Albuquerque*, 417 F.3d 1144, 1154 (10th Cir. 2005) (holding we will not decide issues that do not affect the outcome of a dispute).

Lastly, Ms. Dehning claims the district court's authority to assess attorney fees and costs is limited to those instances where the underlying suit is frivolous, unreasonable, or without foundation. Yet this argument ignores the court's inherent authority to "assess attorney's fees when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (citation and external quotations omitted); see also *Morganroth & Morganroth v. DeLorean*, 213 F.3d 1301, 1317 (10th Cir. 2000) (holding that "federal courts have . . . inherent power to sanction parties for bad faith conduct *in litigation*"). Because the record supports the district court's factual finding that Ms. Dehning's litigation conduct in refusing to consummate the settlement agreement was "arbitrary, willful, and without cause," Aplt. App., Vol. III, Doc. 43 at 3, we affirm the award of fees and costs.

For the foregoing reasons, the defendants' motions to dismiss are denied, and the district court's judgment is affirmed.

Entered for the Court

PER CURIAM

FILED
United States Court of Appeals - Tenth Circuit
February 8, 2008
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DENISE J. DEHNING,

Plaintiff-Appellant,

v. No. 07-8008

CHILD DEVELOPMENT
SERVICES OF
FREMONT COUNTY; et. al,

Defendants-Appellees.

ORDER

Before TACHA, McCONNELL, and GORSUCH,
Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

94

Supreme Court, U.S.
FILED

07 15 10 MAY 7 - 2008

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

Denise Dehning,

Petitioner,

v.

Child Development Services
of Fremont County, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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District of Wyoming
DEC 11 2006
Stephan Harris, Clerk
Cheyenne

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

DENISE J. DEHNING,

Plaintiff,

vs. Case No. 05CV249B

CHILD DEVELOPMENT SERVICES OF FREMONT COUNTY, et al.,

Defendants.

ORDER ENFORCING SETTLEMENT

THIS MATTER came before the Court on the 1st day of December, 2006 on Defendants' Motion to Enforce Settlement. Denise Dehning, Plaintiff, appeared with her attorney, Donna S. Courtney. Sky D Phifer, attorney, appeared on behalf of the Defendants. After testimony and hearing arguments of counsel the Honorable Clarence A. Brimmer, United States District Judge found as follows:

1. On April 3, 2006 the parties entered into settlement negotiations at the office of Joseph E. Vlastos in Casper, WY, with Mr. Vlastos mediating the settlement negotiations. At the end of the day the parties reached an agreement, which agreement was recited before all parties, and assented to by all parties, including the Plaintiff. This agreement was set out in full by Mr. Vlastos on April 4, 2006 by letter and submitted to the parties. The agreement letter of Mr. Vlastos was entered into evidence as Defendants' Exhibit 1. The agreement contemplated the drafting of a release by Plaintiff's counsel and an independent contractor agreement by Defendants' counsel. The settlement agreement as set out in Defendants' Exhibit 1 is binding and should be enforced except as set out below.
2. Counsel for Plaintiff admitted that an agreement was entered into. Plaintiff further admitted in her testimony that an agreement was entered into. Plaintiff further admitted in her testimony that an agreement was entered into, and specifically admitted the material terms of the agreement. No fraud was alleged or proven by Plaintiff to constitute a defense to the agreement under the statute of frauds, especially in light of the Plaintiff's admission, under oath, before this Court that an agreement had been entered into. See Brockman v. Sweetwater County School

District #1, 826 F.Supp. 1328 (U.S.D.C., Dist. of Wyo. 1993), on appeal, 25 F.3d 1055 (10th Cir. 1994)

3. Plaintiff refused to sign the release. Plaintiff testified that she had not understood that the settlement concerned her sex [sic] harassment claim as well as her retaliation claim, despite the fact that the Confidential Mediation Statement prepared by Plaintiff's counsel and reviewed by Plaintiff prior to its submission to Mr. Vlastos explicitly stated "This is a sexual harassment and retaliation case" (see Defendants' Ex. 9).
4. Plaintiff also refused to sign the independent contractor agreement as she objected to certain language within the agreement. Plaintiff then refused to meet with her attorney to finalize the language.
5. Plaintiff had no reasonable grounds to not sign the paperwork reflecting portions of the settlement. Plaintiff is a well educated woman with a Master's degree and her contention that she did not understand that both the sexual harassment and retaliation issues were settled is unrealistic.
6. Plaintiff's attorney, Mr. Don Rissler and the mediator, Mr. Joseph Vlastos, performed very well, both competently and professionally, in their respective roles.
7. Plaintiff's refusal to finalize the independent contractor agreement which was to start in August of 2006 constituted a waiver of her right to such agreement, especially considering the fact that Defendant Child

Development Services of Fremont County had to hire another physical therapist to perform the duties Plaintiff was to perform.

8. Plaintiff's refusal to abide by the terms of the settlement agreement was arbitrary, willful, and without cause and Plaintiff should be assessed Defendants' attorney's fees and costs in the amount of $7,376.72 in prosecuting their Motion to Enforce Settlement. Plaintiff should also be assessed the additional fees of the mediator, Mr. Vlastos, consisting of 3 hours at $175.00, 6 hours at $90.00 for travel time, and $144.00 for mileage ($.40 per mile x 360 miles) for a total of $1209.00.
9. Mr. Don Rissler is entitled to his fees pursuant to his contingency fee agreement in the amount of $12,000.00 consisting of 40% of the recovery in this matter.
10. Defendants' attorney's fees and costs, Mr. Vlastos' fees and costs, and Mr. Rissler's fees should be withheld from the $30,000.00 to be paid to Plaintiff as part of the settlement.

IT IS THEREFOR ORDERED:

1. That the settlement agreement entered between the parties on April 3, 2006 as set out in Defendants' Exhibit 1 is ratified by this Court, except as to those provisions set out below.
2. Plaintiff is found to have waived the Independent Contractor Agreement thereby deleting paragraph (2) from the settlement.

3. Defendants shall pay to Plaintiff the sum of $30,000.00 less Defendants' attorney's fees and costs in the amount of $7,376.72, Mr. Vlastos' fees and costs in the amount of $1,209.00, and Mr. Rissler's fees in the amount of $12,000.00.

4. All claims by Plaintiff against Defendants, both known and unknown, to date are hereby released, including all claims for sexual harassment as well as retaliation.

IT IS FURTHER ORDERED that this matter is hereby dismissed with prejudice with Plaintiff paying her own costs and attorney's fees, as well as Defendant's attorney's fees and costs in prosecuting their Motion to Enforce Settlement.

DATED this 11th day of December, 2006

/s/ Clarence A. Brimmer
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ Donna S. Courtney
Donna S. Courtney
attorney for Plaintiff

/s/ Sky D Phifer
Sky D Phifer
attorney for Defendants

04

(3)

No. 07-1510

Supreme Court, U.S.
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AUG 1 - 2008
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In The

Supreme Court of the United States

DENISE DEHNING,

Petitioner,

v.

CHILD DEVELOPMENT SERVICES
OF FREMONT COUNTY, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

Rule 15.2 of the Rules of the Supreme Court of the United States points out that a Brief in Opposition "should address any perceived misstatement of fact or law in the Petition that bears on what issues properly would be before the Court if Certiorari were granted." To do so in this case would far exceed the word limit imposed by this Court as Ms. Dehning, appearing Pro Se, in her narration of the facts, does not limit herself to the facts contained within the record, and indeed does not cite to the record at all. Respondents will therefore simply point out the pertinent facts with appropriate citation to the record.

Child Development Services of Fremont County ("CDS") is a non-profit organization that contracts with the Department of Health to deliver services to developmentally disabled children, birth through age five (5), in Fremont County, Wyoming. (R. vol. 4, p. 31). Alfred "Al" McClelland was the Executive Director of CDS. (R. vol. 4, p. 31). Scott Carlson is the Special Education Director for CDS. (R. vol. 4, p. 31). The remaining Defendants were all volunteer board members for CDS. (R. vol. 1, doc. 1).

Plaintiff Denise J. Dehning has a four-year undergraduate degree and a masters degree in health science. (R. vol. 4, pp. 82, 83). In 2003, Denise J. Dehning was hired to be a physical therapist for CDS for the 2003-2004 school year. (R. vol. 2, doc. 1).

On April 27, 2004, Denise J. Dehning reported to Al McClelland that she felt that she was being sexually harassed by Scott Carlson and it was suggested by Al McClelland that she file a written grievance. (R. vol. 2, doc. 4, p. 1). On May 1, 2004, Denise J. Dehning filed a written grievance against Scott Carlson and also a written grievance against Al McClelland as she felt that he had not taken her seriously when she reported the sexual harassment on April 27, 2004. (R. vol. 2, doc. 4, p. 1).

On July 15, 2004, Denise J. Dehning filed a charge of discrimination with the EEOC for unwelcome sexual harassment. (R. vol. 2, doc. 18). The EEOC issued its Dismissal and Notice of Rights on May 31, 2005, to the complaint of sexual harassment filed July 15, 2004, which dismissed her complaint and gave her notice that she could file a lawsuit within 90 days of her receipt of the notice. (R. vol. 2, doc. 44). When Denise J. Dehning expressed her concern about the dismissal and requested an explanation, Jenette M. Leino, Acting District Director gave the following explanation for the dismissal:

> In your Charge of Discrimination filed on July 14, 2004, you alleged that you were subjected to sexual harassment by your supervisor, Mr. Scott Carlson. In the documents that you submitted, you stated the following incident of harassment occurred:
>
> Mr. Carlson teased you from a distance and tried to seek your attention in September 2003. In October 2003, Mr. Carlson, sat

across the table from you during a luncheon and talked to you more often than the others present. On November 4, 2003, Mr. Carlson joked that they should send the police out looking for you and asked whether you were at "Good Time Charlie's". Mr. Carlson leaned on the counter next to you. On five occasions, Mr. Carlson talked beside you instead of facing you. Mr. Carlson whispered a tease in your ear in reference to your driving after a snowstorm.

Mr. Carlson asked you several times if the company Christmas party could continue at your house. Mr. Carlson found excuses to visit you. On January 9, 2004, during a practice CPR session using an infant doll, Mr. Carlson made a comment that you "blew its brains out." On February 6, 2004, Mr. Carlson made the comment that he and Diane were mad that you would not let them watch a movie (Christmas Vacation) at your place after the Christmas party.

In your statement dated May 1, 2004, you stated that Mr. Carlson never used sexual words with you and you felt that he was seeking your attention.

In determining whether unlawful sexual harassment has occurred, the EEOC considers whether the frequency and severity of the conduct create a hostile work environment. The definition may vary from individual to individual; therefore, the courts have recognized a "reasonable person" standard. In

> your case, several incidents occurred over a six month period; however, a review of the incidents does not show severity or that the conduct was hostile, patently offensive or sexually motivated.
>
> I have again reviewed the evidence in your case and find that the totality of the evidence presented in your case did not rise to the level of unlawful sexual harassment. In addition, you took appropriate steps by discussing the conduct with you supervisor and the Executive Director. The conduct did not continue. For these reasons, Charge 32K-2004-00184 was dismissed.

(R. vol. 2, doc. 52, pp. 1-2).

On September 8, 2004 Denise J. Dehning filed another charge of Discrimination with the EEOC alleging retaliation for having reported the allegation of sexual harassment to her employer. The retaliation was alleged to have been the failure to be offered a raise from the previous year as received by similarly situated employees and that she wasn't rehired for the 2004-2005 school year. (R. vol. 2, doc. 23).

Denise Dehning, through her attorney, Donald Rissler, filed suit alleging sexual harassment and retaliation in the District Court for the District of Wyoming. (R. vol. 1, doc. 1). On April 3, 2006, a mediation was held between the parties at the law office of Joseph E. Vlastos in Casper, Wyoming. (R. vol. 3, def. ex. 1). Mr. Vlastos had practiced as an attorney

for over 40 years and had done "right at 300" mediations over the last six years. (R. vol. 4, p. 17).

Prior to the mediation both parties had submitted a Mediation Statement. The Mediation Statement which was filed by Donald Rissler, had been reviewed and approved by his client Denise J. Dehning. (R. vol. 4, p. 42, pp. 78-79). The Mediation Statement submitted on behalf of Denise J. Dehning started out; "This is a sexual harassment and retaliation case." and went on to describe various sexual harassment claims of Denise J. Dehning as well as her retaliation claim. (R. vol. 3, def. ex. 9; vol. 4, pp. 42-44). The mediator, Mr. Vlastos, understood the subject matter of the mediation was in the nature of sexual harassment discrimination and also retaliation. (R. vol. 4, pp. 18-19). Denise Dehning's attorney, Donald Rissler, also understood that the mediation involved the issues of retaliation as well as sexual harassment. (R. vol. 4, p. 6). Prior to the mediation, Denise J. Dehning had checked out a sexual harassment book from the public library and during the mediation had pointed out to her attorney several sections in the book that had to do with sexual harassment law and the rule of damages. (R. vol. 4, p. 61).

At the end of the day on April 3, 2006, a settlement agreement was reached. (R. vol. 3, def. ex. 1). The agreement was set out orally by Mr. Vlastos with all parties present and included all the terms set out in the follow-up mediation/settlement conference letter to the attorneys dated April 4, 2006. (R. vol. 4, pp. 26, 32, 41, 59). Mr. Vlastos, Al McClelland, and

Donald Rissler all testified that Denise Dehning specifically stated that she agreed with all the terms. (R. vol. 4, pp. 27, 32, 60).

Denise J. Dehning, herself, testified that on April 3, 2006, Mr. Vlastos recited the terms as more particularly set out in his subsequent letter of April 4, 2006, and that she agreed to the terms of the settlement agreement. (R. vol. 4, pp. 41-42). Denise J. Dehning did not have any questions about the settlement agreement when it was presented to her and the other parties when she gave her assent on April 2, 2006. (R. vol. 4, p. 60).

The settlement agreement between the parties recited orally and set out in the April 4, 2006 letter of Mr. Vlastos, provided that in return for the payment of $30,000.00 and a one (1) year Independent Contractor Agreement Denise J. Dehning would release all claims against the Respondents. (R. vol. 3, def. ex. 1).

Pursuant to the settlement agreement Donald Rissler prepared the Release document and Sky D Phifer, Attorney for CDS et al., prepared the Independent Contractor Agreement. (R. vol. 4, pp. 63-64). At the request of Denise J. Dehning and her attorney changes were made to the Independent Contractor Agreement. (R. vol. 4, pp. 61, 71).

When Denise J. Dehning met with Donald Rissler at his office to sign the documents, Denise J. Dehning refused to sign claiming she agreed to settle only her retaliation claim, not her sexual harassment

claim and left Mr. Rissler's office to more thoroughly review the documents, and within a few days fired Mr. Rissler. (R. vol. 4, pp. 43, 63-64). Donald Rissler had asked Denise J. Dehning to stay in his office to work out any changes, which Denise J. Dehning refused. (R. vol. 4, pp. 84, 65-66).

Upon being informed that Denise J. Dehning refused to sign the final paperwork, Child Development Services, et al. filed a Motion to Enforce the Settlement Agreement. (R. vol. 1, doc. 18).

On May 22, 2006, Donald Rissler filed a Motion to Withdraw as attorney for Denise J. Dehning due to her uncooperation in finalizing documents, which Motion was granted on July 20, 2006. (R. vol. 1, docs. 19, 21). Prior to being allowed to withdraw by the Court, Donald Rissler made two attempts to get Denise J. Dehning to come in, work on whatever changes needed to be made to the documents, and execute them. (R. vol. 3, def. ex. 10, 13). Denise J. Dehning, at first, testified that Donald Rissler did not contact her to work on the documents after she left the office but later conceded that Mr. Rissler had written her two letters on that subject, but that she still refused to finalize the settlement with Mr. Rissler. (R. vol. 4, pp. 88-90).

Denise J. Dehning then had attorney Aparna Durbin write a settlement letter to CDS's attorney demanding $70,000.00 instead of the $30,000.00 agreed upon as well as other material changes to the settlement entered into by the parties on April 2,

2006. (R. vol. 2, doc. 91). The attorney for CDS responded that while they were willing to work on the language of the Release and the Independent Contractor Agreement, they were not willing to vary the terms of the settlement agreement reached on April 3, 2006. (R. vol. 2, doc. 92).

Denise J. Dehning not only refused to sign an independent contractor agreement, but failed to show for work in August of 2006. (R. vol. 4, pp. 33-34, 48). As a result, CDS was forced to hire another physical therapist in order to service their children under federal guidelines. (R. vol. 4, p. 34).

Attorney Donna Courtney represented Denise J. Dehning at the hearing on the Motion to Enforce the Settlement Agreement held on December 1, 2006. (R. vol. 4). In her opening statement Donna Courtney, referring to Mr. Vlastos, the mediator, stated:

> MS. COURTNEY: Yes, Your Honor. And he did a fine job, your Honor. He mediated very well. My client felt that he advocated for her and she did – that's the point that I think is missing here, she did agree to everything Mr. Vlastos had said. One of the things –
>
> THE COURT: At the end of the settlement conference –
>
> MS. COURTNEY: Absolutely. One of the things that he –
>
> THE COURT: She assented to the agreement.

> MS. COURTNEY: Absolutely she did, Your Honor. The issue isn't that.
>
> THE COURT: Then at that point –
>
> MS. COURTNEY: Un-huh.
>
> THE COURT: – the settlement was made.
>
> MS. COURTNEY: Absolutely.

(R. vol. 3, def. ex. 1).

In response to further questioning by the Court, Donna Courtney stated in her opening:

> THE COURT: And she assented to the agreement. She made an agreement. I guess they probably didn't shake hands on it, but she still assented to it.
>
> MS. COURTNEY: They did make the agreement.

(R. vol. 4, p. 14).

At the hearing held on December 1, 2006, on the Motion to Enforce the Settlement Agreement, the Honorable Judge Clarence A. Brimmer ordered the agreement as set out in Mr. Vlastos' letter of April 4, 2006, to be upheld and found that Denise J. Dehning had waived her right to an independent contractor position with CDS. (R. vol. 1, doc. 43).

II. ARGUMENT FOR DENYING THE WRIT

A. Summary Of Argument

"A Petition for a Writ of Certiorari will be granted only for compelling reasons." Rule 10, Considerations Governing Review on Certiorari, Rules of the Supreme Court of the United States. "A Petition for a Writ of Certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10 of the Rules of the Supreme Court of the United States. The Petition fails to put forth any compelling reasons to justify further review of this matter.

The underlying allegations of sexual harassment constitute neither harassment nor sexual harassment under the law and was so ruled upon by the EEOC. See also *Alder v. WalMart Stores, Inc.*, 144 F.3d 664 (10th Cir. 1998); *EEOC v. PVF*, F.3d 790 (10th Cir. 2007). Since making the allegations, Denise Dehning has embarked upon a crusade and anyone who has not agreed with her, which is everyone, including her own attorneys and the administrative and judicial branch of the federal government, either gets grieved, sued, or labeled as incompetent, a perjurer, an alcoholic, or "stroke impaired and hearing impaired."

The decision of the Tenth Circuit Court of Appeals, as well as the underlying decision of the United States District Court for the District of Wyoming follow the standard rules of law for contract formation and interpretation and are fully substantiated by

the underlying factual record, including the testimony of Denise Dehning, herself.

B. Plaintiff's Allegations That Her Constitutional Rights To Due Process Have Been Violated By A Body Designed To Protect Such Rights.

Petitioner Denise Dehning's argument under this question presented is difficult at best to respond to. There are no citations to the record. Most of what Ms. Dehning sets out as facts is simply not in the record anywhere. The argument is supported by neither citation to legal precedent, nor coherent argument.

Denise Dehning submitted her Appeal to the Tenth Circuit, which affirmed the District Court ruling upholding the Settlement Agreement entered into by the parties. Apparently because she was not on the automatic email list, she did not automatically receive a copy of the decision. Denise Dehning nevertheless, discovered that a decision had been entered and received a copy. She filed a Petition for Rehearing, which Petition for Rehearing was denied. She then petitioned for a Writ of Certiorari to the United States Supreme Court.

Denise Dehning has had her full remedies under the law and has had multiple opportunities to be heard and has been heard. There has been no denial of due process.

C. Plaintiff's Allegations That The Tenth Circuit Erred In Affirming A Decision Of A District Court Clearly Conflicting With Contract Law Established In All Jurisdictions.

1. Meeting Of The Minds

As Allen B. Johnson, Chief Judge for the District of Wyoming, stated in *Brockman v. Sweetwater County School District #1*, 826 F. Supp. 1328 (USDC, District of Wyoming, 1993):

> It is an inherent power of this Court to enforce Agreements entered into in settlement of litigation. *Eastern Energy, Inc. v. Unico Oil & Gas, Inc.*, 861 F.2d 1379, 1380 (5th Cir. 1988). Federal courts have the intrinsic authority and equitable power to enforce compromise agreements entered into before them, even where such agreements have not been reduced to writing. *Bogwater North America Corp. v. Murray Machinery*, 773 F.2d 71, 77 (6th Cir. 1985).

Construction of a settlement agreement is generally governed by State law. *Brockman v. Sweetwater County School District #1*, 25 F.3d 1055 (10th Cir. 1994). Wyoming law favors settlement of litigation. *Peters Grazing Ass'n v. Legerski*, 544 P.2d 449 (Wyo. 1975); *Brockman*, id.

"The existence of a contract requires a meeting of the minds of the parties to it." *Wyoming Sawmills, Inc. v. Morris*, 756 P.2d 774, 775 (Wyo. 1988); *Jackson Hole Builders v. Piros*, 654 P.2d 120 (Wyo. 1982).

"An unconditional, timely acceptance of an offer, properly communicated to the offeror, constitutes a meeting of the minds of the parties and establishes a contract." *Wyoming Sawmills*, ibid at p. 775. *Wyoming Sawmills* involved a disagreement concerning 230,000 board feet of green sawn logs, involving various claims and liens of four different parties. All four parties entered into negotiations both face to face between counsel and then followed up with a four way telephone conversation where the final term, not previously agreed to, was resolved. The parties were then to meet the following day to execute the written documents of settlement. The Wyoming Supreme Court found that the parties had expressed their assent to the agreement and upheld the settlement despite the fact that one of the parties refused to execute the documents.

It was quite clear, and is admitted by Denise J. Dehning that she agreed to the terms of the settlement agreement in April of 2006. Ms. Dehning now maintains that she did not understand that she would be settling both her sexual harassment claim as well as her retaliation claim against Defendants at the mediation conference and that therefore there was no meeting of the minds. The District Court found Ms. Dehning's claims to be "unrealistic." (R. vol. 4, p. 97).

On appeal, the Tenth Circuit went on to state:

> More to the point, a "unilateral mistake is not grounds 'for avoidance of the contract . . . unless the mistake was produced by the

> other party.' *Givens v. Fowler*, 984 P.2d 1092, 1096 (Wyo. 1999) . . . There is, however, no evidence that the defendants were responsible for her mistake concerning the scope of the claim included in the Agreement.

(A.1). Ms. Dehning now claims that it was not her mistake but that of CDS (and apparently her attorney Don Rissler and the mediator as well). However, any confusion by CDS as to the scope of the Settlement was caused by the wording of the Complaint, the Mediation Statement submitted by Ms. Dehning's attorney, which she approved, and indeed by the course of the mediation and the subsequent Settlement Agreement terms agreed to by Ms. Dehning, which included settlement of all claims.

The evidence that Denise J. Dehning knew that the mediation and subsequent settlement agreement included both the retaliation claim and the sexual harassment claim is more than substantial, it is overwhelming and uncontradicted:

1. The Complaint filed by Denise J. Dehning included both allegations of sexual harassment and retaliation. (R. vol. 1, doc. 1 ¶ 11, 12, 13, 15, 34);

2. Both parties were requested by Mr. Vlastos to submit a Confidential Mediation Statement prior to the mediation. Denise Dehning admitted in her testimony that she reviewed the Confidential Mediation Statement prior to its submission to Mr. Vlastos and approved of the statement, with minor changes. (R. vol. 4, pp. 42-44, 78-79). This Confidential Mediation Statement starts out: "This is a sexual

harassment and retaliation case." (R. vol.3, def. ex. 9). The Confidential Mediation Statement then went into certain facts alleging sexual harassment by two CDS employees as well as the facts surrounding the retaliation claim. (R. vol. 3, def. ex. 9).

3. Denise J. Dehning admitted that she agreed to the terms at the mediation on April 3, 2006, as cited by Mr. Vlastos which included:

> For the consideration of Thirty Thousand Dollars ($30,000.00) to be paid to Plaintiff by Defendant, **Plaintiff shall execute the appropriate Release document wherein Plaintiff releases all claims, known or unknown against Defendant.** Further, Plaintiff will authorize the dismissal of this litigation with prejudice to Plaintiff.

(Emphasis added) (R. vol. 3, def. ex. 1) (R. vol. 4, pp. 41-42).

4. Donald Rissler, Denise J. Dehning's counsel at the mediation, testified that the mediation included both the sexual harassment as well as the retaliation claim and that both the sexual harassment and retaliation claims were addressed. (R. vol. 3, def. ex. 9; vol. 4, pp. 60-62). He further testified that Denise J. Dehning came to the mediation with a book on sexual harassment and referred to sections on sexual harassment during the mediation. (R. vol. 4, p. 61).

5. Al McClelland, Director at CDS, testified that he understood that the settlement covered all "issues", for all "the individual Defendants", on all "sexual harassment" claims. (R. vol. 4, pp. 35-36).

6. The mediator, Joseph Vlastos, testified that he understood that Denise J. Dehning had filed a sexual harassment lawsuit. (R. vol. 4, p. 18). Mr. Vlastos reviewed the Mediation Statement, Defense Exhibit 9, submitted by Denise J. Dehning and her attorney where they set out the fact it was a sexual harassment and retaliation case and included the underlying facts of the sexual harassment and retaliation claims. (R. vol. 4, pp. 18-19). Mr. Vlastos stated all issues were discussed during the mediation and none were excluded. (R. vol. 4, p. 19). The terms, which he reviewed with all parties, and to which all parties agreed on April 3, 2006, included the release of all claims, known and unknown, against the Defendants. (R. vol. 4, pp. 23, 29).

7. At the December 1, 2006 hearing Denise J. Dehning's counsel stated nine times, during opening, taking of testimony and during closing, that Denise J. Dehning agreed to everything Mr. Vlastos said in the settlement agreement letter of April 4, 2006 and that there were no problems with the Settlement Agreement. (R. vol. 4, pp. 10, 11, 13, 14, 68, 81, 94-95).

Wyoming has adopted the objective theory of contract formation, whereby a single "contractual obligation is imposed not on the basis of the subjective intent of the parties, but rather upon the outward

manifestation of a party's assent sufficient to create reasonable reliance by the other party." *McDonald v. Mobil Coal Producing, Inc.*, 820 P.2d 986, 990 (Wyo. 1991).

Denise J. Dehning's outward manifestation of assent was witnessed by the mediator, the attorneys, and the other parties and was admitted to by Denise J. Dehning herself.

All essential terms were agreed upon at the settlement conference held on April 3, 2006. "An agreement to make a written contract where the terms are mutually understood and agreed on in all respects is as binding as the written contract would be if it had been executed." *Wyoming Sawmills*, supra at p. 776; *Robert W. Anderson Housewrecking and Excavating, Inc. v. Board of Trustees, School District No. 25, Fremont County, Wyoming*, 681 P.2d 1326, 1331 (Wyo. 1984).

All parties have acknowledged the material terms of the settlement. Denise J. Dehning's claim that there was not a meeting of the minds is without basis in the record.

2. Parties Intended To Complete The Agreement In Writing.

Denise J. Dehning claims that the parties intended to complete the settlement in writing and since the release and independent contractor agreement were not executed by her, there was no settlement.

As noted in Mr. Vlastos' letter of April 4, 2006, the parties agreed that Mr. Vlastos would set forth the terms in writing by way of a letter to the parties' attorneys. (R. vol. 3, def. ex. 1). All testified, including Denise J. Dehning, that the letter sent by Mr. Vlastos on April 4, 2006, contained the terms of the agreed settlement. (R. vol. 4, pp. 22-27, 32, 41-42, 59-60). Included as two of the nine terms of settlement were:

(1) A release would be prepared "wherein Plaintiff releases all claims, known or unknown against Defendants" and;

(2) An Independent Contractor Agreement would be prepared whose terms were set out in paragraph 2 of the letter.

Ms. Dehning claims that the parties expected the whole agreement to be embodied in an agreement other than Mr. Vlastos' letter is unsupported by the record. The record only reflects that all the material terms of the settlement, including the material terms of the release and independent contractor agreement, were included in the Vlastos letter of June 4, 2006.

Denise J. Dehning refused to sign the papers as written and then refused to work on the language of the documents, instead preferring to fire her attorney. (R. vol. 4, pp. 48, 83-90). After waiting four months, Ms. Dehning had another attorney ask for more money and additional terms. (R. vol. 2, doc. 91).

The District Court's decision ratifying the Settlement Agreement was not clearly erroneous. (R. vol. 4, p. 96).

D. The Finding Of The District Court That The Statute Of Frauds Was Inapplicable Is Not Clearly Erroneous.

The Tenth Circuit held:

> Ms. Dehning separately argues the employment agreement portion of the settlement violated the statute of frauds because it was not in writing. This argument is, however, irrelevant in light of the district court's conclusion that "the independent contractor agreement has been waived[.]" ***Id.***, Vol. IV at 98. Because the district court did not enforce the employment agreement, we do not address whether the statute of frauds applies. See *Orr v. City of Albuquerque*, 417 F.3d 1144, 1154 (10th Cir. 2005) (holding we will not decide issues that do not affect the outcome of a dispute).

Ms. Dehning does not address the issue of waiver, but simply wants to avoid the Settlement Agreement she admitted she agreed to, claiming it is in violation of the statute of frauds.

Not only did Ms. Dehning waive any right to the independent contractor portion of the settlement agreement, but the judicial admission exception would exclude the application of the statute of frauds. The judicial exception allows the courts to enforce oral

agreements as long as the party against whom enforcement is sought has admitted in court or during discovery that an oral agreement existed. *Gibson v. Arnold*, 288 F.3d 1242 (10th Cir. 2002); *Flight Systems, Inc. v. Electric Data Systems, Corp.*, 112 F.3d 124 (3rd Cir. 1997). *Clay v. Hanson*, 536 A.2d 1097 (D.C. 1988); 73 *Am. Jur. 2d*, Statute of Frauds § 478. Where the making of a contract is admitted no additional writing is necessary for protection against fraud, and the contract becomes enforceable notwithstanding the provisions of the Statute of Frauds. *Dangerfield v. Markel*, 252 N.W.2d 184 (N.D. 1977).

"The statute of frauds was enacted to prevent fraud, not to aid it, and should receive a reasonable interpretation with that end in view. The great majority of courts have always endeavored to keep that principle uppermost in rendering their decisions." *Mead v. Leo Sheep Co.*, 232 P. 511, 515 (Wyo. 1925); *Wallis v. Bosler*, 246 P.2d 771, 777 (Wyo. 1952).

III. CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 07-1510

In The

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Supreme Court of the United States

Denise Dehning,

Petitioner,

v.

Child Development Services
of Fremont County, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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Dehning's Petition for Certiorari, though it omits many provable, titillating details, might well double as a "This Story is True" movie proposal. The record supports every detail and much more. This Court is the final arbiter of the judicial branch of the United States government, and Dehning implores it to grant her the justice she has been shamefully denied. The Court of final resort is the people. Dehning's resolve is implacable. The saga of her struggle includes all elements of superlative story, and if necessary, she will find a way to see it told.

For four years Dehning has been battling illegal, unethical, unjust, and/or incompetent acts, from defendant CDS, to the Wyoming Fair Employment Protection Agency (WFEPA), to the Equal Employment Opportunities Commission (EEOC), to the federal district court, to the federal appellate court.

CDS' Brief in Opposition is fraught with error and misstatement of the record. CDS director Al McCelland did <u>not</u> suggest that Dehning file a grievance. McClelland, unknown to Dehning, had been alerted by Dehning's supervisor that Dehning would be coming to him and thought to end the matter summarily. Dismissive, impatient, and patronizing, he remarked that Dehning had not filed a grievance, implying that her complaint was not serious. (The CDS sexual harassment policy made no provision for grievance.) He later filed a provably fraudulent memo to exonerate himself for his illegal failure to entertain Dehning's complaint. (v. 1, doc. 33 at 2 – 5; v. 2 at 24).

Dehning did not file a charge of discrimination with the EEOC for sexual harassment on July 15, 2004. Sexual harassment is not at issue in this case and has never been. Dehning's in-house harassment grievance was never decided and therefore could not be appealed. (The CDS Board nullified McClelland's decision on the grievance and instructed him to reopen the matter; he failed to make further findings.) (v. 1, doc. 33 at 5 – 7; v. 2 at 17).

Dehning did not file a complaint with the EEOC, as CDS states, but with the WFEPA, on June 24, 2004, not, as CDS states, on July 15, 2004. She complained to the WFEPA of discrimination based on the adverse employment actions she suffered from reporting harassment, not for "unwelcome sexual harassment," as CDS states. The WFEPA ignored nine (9) of the ten (10) pages of Dehning's supplemental information document and prepared a sexual harassment charge, over which it had no jurisdiction, thereafter advising Dehning that the case had been passed to the EEOC, but assuring her that the EEOC would "look at everything" and "investigate thoroughly." (v. 1, doc. 33 at 7; v. 2 at 17, 18;). The WFEPA could and should have prepared a charge based on the information before it and could and should have advised the EEOC of its mistake.

The EEOC (1) did not serve the charge within the ten (10) days mandated by Title VII (42 U.S.C. §2000e-5 [Title VII §706(b)]), (2) did not notice that neither it nor the WFEPA had no jurisdiction over harassment (did not read the file, including a seventeen (17)-page document Dehning

filed, (3) did not whatsoever investigate the retaliation that caused Dehning to seek help, (4) did not allow Dehning – a meek, submissive-seeming person – to raise the retaliation, and (5) itself retaliated against Dehning the day it received the third letter from the Wyoming congresswoman on Dehning's behalf by dismissing the (apparent) charge of sexual harassment wrongly and incompetently prepared by the WFEPA. (v. 1, doc. 33 at 9- 11). Again, Dehning filed her complaint because of adverse employment actions, and the EEOC had no jurisdiction to entertain or rule on a charge of sexual harassment. The EEOC is responsible for understanding the charges before it and here did not. The EEOC could and should have served the actual charge Dehning had filed with the legally-mandated ten (10) days, alerting CDS that a watchdog agency was at work.

(Presumably, the EEOC dismissed the first charge – retaliation following a report of harassment – and has subsequently ignored the questions of all Wyoming's United States congresspeople and Vice President Cheney's office, because it intended to issue a Right to Sue letter on the second charge – retaliatory failure to rehire – and wanted to cover up its failure to serve notice of the first charge within the 10 days required by 42 U.S.C.§2000e-5 ([Title VII §706(b)]) and its failure to return her phone calls. This failure had grave consequences, as CDS would surely have rehired Dehning had it known she had complained to a protective agency. By pretending that retaliation did not occur until the time of the second charge,

the EEOC appears to be hoping to sweep the initial, different retaliation under the rug.)

Instead, unaware that Dehning had taken steps to protect herself, CDS hired multiple personnel to handle Dehning's caseload and falsely advised her that it had no use for the services she provided. Dehning filed a second charge with the WFEPA for retaliation based on failure to rehire. The WFEPA again passed the charge to the EEOC. (v. 1, doc. 33 at 10; v. 2 at 20, 22).

The EEOC dismissed the erroneous charge of sexual harassment on the grounds that "the harassment stopped." (v. 1, doc. 33 at 11). The EEOC's failure to serve the charge within the legally required ten (10) days was a violation of federal law and its own policy and was a dereliction of its duty to understand the charge before it, notwithstanding the WFEPA's egregious error. Dehning's supplemental documents were single-spaced, narrow-margined, and long. The inference that they were unread, by either the WFEPA or the EEOC, is inescapable. The documents describe retaliation. (v. 2 at 17, 29).

Entitled by law to an investigation of her complaint of adverse employment actions following her report of harassment, Dehning continues to the present day her effort to force the EEOC to reopen this case.

Insisting on dragging the red herring of sexual harassment across the facts, CDS devotes pages of its brief to excerpts from an EEOC letter to Dehning explaining why her "charge of sexual harassment" had been dismissed. (The EEOC letter misstates the facts in any event.) (v. 2 at 17,

29). Again, sexual harassment could not be appealed, could not be litigated, could not be mediated. Whatever the subsequent misunderstanding of the mediator or the district judge or the 10th Circuit, sexual harassment was not at issue. CDS retains jurisdiction to this day.

CDS confuses Dehning's first and second charges, mistakenly stating that on September 8, 2004, Dehning filed a second charge of discrimination with the EEOC (she filed the charge with the WFEPA) "for having reported the allegation of sexual harassment to her employer" – the clearly-stated basis of her first charge, though neither agency grasped the facts. (v. 2 at 17).

Still intent on obfuscating the issues, CDS states that Dehning filed suit alleging sexual harassment and retaliation. The Complaint, written by Dehning's then-attorney Donald Rissler, states as its cause of action the single allegation of retaliation based on failure to rehire. (v. 1, doc. 1).

CDS states that Dehning approved her Mediation Statement. Dehning did <u>not</u> approve the Statement, was not allowed to approve it. She read a garbled first version, reasonably assumed that the references to sexual harassment were to show that the charge was based on harassment rather than race, religion, age, etc. and wrote changes in the margins and on post-it notes. The changes did not appear in the final Statement. (v. 1, doc. 33 at 22 – 23; v. 2 at 61, 62).

CDS alleges that Dehning agreed to all terms of the settlement agreement. Though she had not been advised, by Rissler or the mediator, that agreement meant the release of the charge she

was independently pursuing, she did agree to the essential terms of the settlement. (v. 1, doc. 33 at 16 – 17, 24 – 25; v. 2 at 56).

Integral to the settlement, and not performable within a year, was Dehning's independent employment contract, negotiated because Dehning refused to be supervised by her former supervisor or the CDS director. Her employment was otherwise to remain the same. (v. 1, doc. 33 at 24; v. 2 at 66).

Rissler presented Dehning with a settlement agreement that released the charge she was independently pursuing, released prospective claims, and omitted altogether mention of her independent employment contract. (v. 2 at 67). The contract provided by CDS called for increased supervision by her supervisor and the CDS director, gave CDS control of her hours, and reduced the scope of her practice. (v. 2 at 68).

Dehning refused to sign. She asked for copies to read at home. Rissler, a large man, said, "No. It's over. You do not have a choice. You are not leaving this office without signing these papers." Dehning wept. Rissler relented, and she left with copies, resolved to never return. (v. 1, doc. 33 at 25 – 27).

Rissler asked CDS to revise the contract. CDS did. The revised contract, on its face, cures none of the variances from the agreement and reinforces one. (v. 1, doc. 33 at 26 – 28; v. 2 at 74).

The facts of the farcical hearing in federal court, the CDS failure to notice witnesses, the judge's announcement of his decision before the introduction of evidence, are in the record. (v. 1,

doc. 39). So, too, does the record lead to the sad and shocking, inescapable inference that the 10th Circuit decided the outcome without reading the record and instructed its clerks to support its decision. (doc. 2034815, doc. 204606, doc. 9540731, doc. 9546945, doc. 9550566) (To this date, Dehning has never received a copy of the 10th Circuit's opinion, as required by law.) (28 U.S.C. Appendix – FRAP 36(b)).

Dehning's legal argument is in her Petition for Certiorari and in various documents in the record. Dehning prays this august Court to carefully review the record and at last grant her justice.